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No. 06-____

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In the Supreme Court of the United States

KHALED A. F. AL ODAH, *ET AL.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF FORMER FEDERAL JUDGES, DIPLOMATS, MILITARY OFFICERS, GOVERNMENT OFFICIALS, BAR LEADERS, POWs AND KAREN KOREMATSU-HAIGH AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF THE *AMICI CURIAE*[1]

Three years ago these *amici* urged the Court to grant review in *Rasul* v. *Bush*, 542 U.S. 466 (2004). The *amici* in *Rasul* came from a wide variety of backgrounds: retired judges, military officers, diplomats, government officials, former POWs, bar leaders and, in the case of Fred Korematsu, an American who had searing personal experience with Executive detention. The *Rasul amici* all urged the Court to take the case because of a profound concern that the Government's detention of individuals at Guantanamo without charge and without access to habeas review presented fundamental issues concerning the rule of law, separation of powers, our country's standing in the world community, and the effect of the Government's detention policy on the safety of American service men and women serving abroad.

This Court did take the case, and almost three years ago held in no uncertain terms that the Guantanamo Detainees were entitled to habeas corpus review to challenge the lawfulness of their detention. But since that decision in June 2004, the Court's mandate has been frustrated and not a single detainee has had a habeas hearing in federal court. Accordingly, the *amici* come before this Court once again to urge the Court to grant review and to decide this case expeditiously because of the extraordinary importance of the issues presented.

Amici and their former positions are as follows: Assistant Secretary of State Diego C. Asencio, Brigadier General David M. Brahms, Ambassador A. Peter Burleigh, Rear Admiral and Judge Advocate General of the Navy

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

Donald J. Guter, State Department Legal Adviser Conrad K. Harper, Assistant Secretary of State Allen Holmes, Rear Admiral and Judge Advocate General of the Navy John D. Hutson, POW Leslie H. Jackson, Circuit Judge Nathaniel R. Jones, Karen Korematsu-Haigh, Assistant Secretary of State Samuel W. Lewis, Chief Judge Abner J. Mikva, USAID Assistant General Counsel Arthur Mudge, Ambassador Richard H. Nolte, Circuit Judge William A. Norris, Ambassador Herbert S. Okun, Under Secretary of State Thomas R. Pickering, Assistant Secretary of State Anthony Quainton, Professor Deborah L. Rhode, Under Secretary of State William D. Rogers, Circuit Judge H. Lee Sarokin, ABA President Jerome J. Shestack, Ambassador Monteagle Stearns, Ambassador Richard N. Viets, Assistant Secretary of State Alexander F. Watson. Please see the Appendix for further information about each of the *amici*.

INTRODUCTION AND SUMMARY OF ARGUMENT[2]

It has been more than five years since the first group of Guantanamo Detainees arrived at Guantanamo Bay, and more than five years since the first of the habeas corpus petitions was filed challenging the military detentions of hundreds of men scooped up around the world and held without charge or trial in the military prison at Guantanamo. The case arising out of that first habeas petition, *Rasul* v. *Bush*, 542 U.S. 466 (2004), reached this Court almost three years ago, when the Court ruled that "federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing." *Id.* at 485. Nearly three years have passed since this Court remanded the *Rasul* cases "for the District Court to consider in the first instance the merits of petitioners' claims." *Ibid.*

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[2] This brief is intended to support the companion petition in *Boumediene* v. *Bush* (No. 06-____) in addition to the above-captioned case.

In all those years—a longer period of time than the length of active American involvement in World War I, World War II, or the Korean War—not a single Guantanamo Detainee has had the legality of his detention adjudicated, on the merits, in a court of law. The court below now has held that, despite *Rasul* and the constitutional guarantee of habeas corpus, no Detainees are entitled to independent judicial review of the lawfulness of their military imprisonment.

Amici urge this Court to grant certiorari to the Detainees and to hear and decide this case as expeditiously as possible. The core promise of the writ of habeas corpus is a promise of prompt adjudication of the lawfulness of detention. Riding circuit during the Civil War, Chief Justice Taney examined the history of the Great Writ. "From the earliest history of the common law, if a person were imprisoned, no matter by what authority, he had a right to the writ of habeas corpus, to bring his case before the king's bench." *Ex Parte Merryman*, 17 F. Cas. 144, 150 (1861). Describing England's "great habeas corpus act" of 1679, Chief Justice Taney wrote: "The great and inestimable value of the habeas corpus act [of 1679] is that it contains provisions which compel courts and judges, and all parties concerned, to perform their duties ***promptly***." *Id.* at 150 (emphasis added).

That promise of promptness at the heart of the common law writ of habeas, effectively codified by the Constitution's Suspension Clause, has been denied to the Guantanamo Detainees, despite this Court's clear holding in *Rasul* almost three years ago. As the Detainees demonstrate in their petitions, the core reasoning and holding of *Rasul*—that federal district courts have jurisdiction to hear applications for habeas corpus by Guantanamo Detainees—was undisturbed by the purported revocations of statutory habeas jurisdiction by the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (2005) (DTA), and the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (MCA). The Constitution entitles the

Guantanamo Detainees to a prompt and meaningful judicial process to challenge the legal and factual grounds for their detentions.

Amici appreciate the exigencies of the moment. However, the Constitution's Suspension Clause outlines the very limited conditions of national peril in which Congress may suspend the privilege of the writ. The majority opinion of the court below never even addressed whether the DTA or the MCA satisfies the strict limits of the Suspension Clause.

This Court has a long tradition of safeguarding the role of courts in monitoring the validity of Executive detention, even in the most precarious moments of our Nation's history. See *Rasul*, 542 U.S. at 474 (providing examples of when this Court has "recognized the federal courts' power to review applications for habeas relief in a wide variety of cases involving Executive detention, in wartime as well as in times of peace," and citing examples from detentions arising out of the Civil War and World War II). Because the common law privilege of the writ of habeas corpus extends to the Guantanamo Detainees and was not validly suspended, federal courts have jurisdiction to reach the merits of the Detainees' claims and the obligation to do so "promptly."

Nevertheless, a divided court of appeals barred the district court from exercising the historic power to test the lawfulness of Executive detention—detention that already has continued without prospect of relief for five years. This is truly a case where justice delayed is justice denied. The Guantanamo Detainees are currently deprived of their liberty in the most fundamental sense. At best, the great majority are held in a maximum security facility, with almost no human contact and at least twenty-two hours per day alone in small, concrete cells.[3] Numerous organizations, including the Federal Bureau of Investigation, have documented

[3] This account derives from the Declaration of Sabin Willett, filed in *Parhat v. Gates*, No. 06-1397 (D.C. Circuit).

instances of abusive treatment. See, *e.g.*, FBI, *GTMO Counterterrorism Division Special Inquiry* (Sept. 9, 2004), *available at* http://foia.fbi.gov/guantanamo/detainees.pdf. *Amici* point to such treatment to underscore the urgency of this Court's adjudication in this matter. As it is, these Detainees must tolerate such conditions without being charged with any crime and without knowing whether their detentions will end at some point in the future, or last for the balance of their lives.

After five long years in harsh military confinement, the time is long past due to begin to inquire into the validity of individual detentions at Guantanamo Bay. The Constitution simply does not allow the Executive or the Legislature to put that inquiry beyond the reach of the courts without complying with the rigors of the Suspension Clause—a test that neither the President nor the Congress suggests could be met here.

ARGUMENT

I. This Court Has A Long Tradition Of Reviewing Executive Detention Pursuant To The Writ Of Habeas Corpus, Even In Times Of National Crisis.

More than five years after the confinement of the Guantanamo Detainees commenced, and almost three years after this Court held that the constitutionally guaranteed common law writ of habeas corpus reaches these Detainees, it is time for the courts to move forward and determine whether the detention of individual detainees at Guantanamo is lawful.

"At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *INS* v. *St. Cyr*, 533 U.S. 289, 301 (2001). This Court has already decided that the Guantanamo Detainees are entitled to access to the writ, so that independent courts can review the legality of the Executive

detentions here. It is long past time that those reviews begin. Only by granting the petitions and expediting consideration of these cases can the Court honor the promise of the writ and protect the integrity of its own decision in *Rasul*.

The "war on terrorism" does not license either the President or Congress to nullify habeas corpus. Justice Story emphasized the importance of making the writ available even in times of crisis, save only situations of actual rebellion or invasion. The writ is a "very just and wholesome restraint, which cuts down at a blow a fruitful means of oppression, capable of being abused in bad times to the worst purposes." JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 208-09 (1833). Throughout our history, this Court and individual Justices have been steadfast in asserting the judicial power under the Constitution, including the power to issue writs of habeas corpus, to ensure that the Executive Branch's assertions of "national security" do not serve as a license for unchecked abuse of liberty. While the Court often has deferred to the judgment of the political branches, the Constitution entrusts to the courts the ultimate protection of individual liberty—especially in times of national anxiety and stress.

The Framers, formulating the Constitution in the shadow of the Revolutionary War, understood that this Nation would face grave threats, and that those threats would put great pressure on the privilege of habeas corpus. They addressed this pressure by precisely limiting the circumstances when the writ may be suspended. The Framers placed the authority to suspend the writ with the Legislature, but confined the circumstances under which that suspension could validly occur: only "when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9.

> "[The framers] knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight

> could not tell; and that unlimited power, where lodged at such a time, was especially hazardous to freemen." *Ex parte Milligan*, 71 U.S. 2, 125 (1866).

The writ of habeas corpus stands as our legal system's oldest and most basic protection against the tyranny of unjustified detention. The fact that the Constitution sets extraordinarily high barriers to suspending that protection, even temporarily, underscores the need for vigilance when the requirements of suspension are unmet.

This Court and its Justices have not shirked the responsibility to test the validity of claims by the President or Congress or both that national dangers justify drastic measures violating personal liberty. Shortly after the end of the Civil War, the gravest threat to its existence this Nation has ever faced, this Court warned of the dangers of allowing the pressures of the present to undermine the birthright of this Nation's past. In *Milligan* this Court declared:

> "The Constitution of the United States is a law for rulers and people, *equally in war* and in peace, and covers with the shield of its *protection all classes of men, at all times, and under all circumstances*. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority." *Milligan*, 71 U.S. at 120-21 (emphasis added).

Repeatedly, throughout its history, this Court has made clear that the privilege of the writ remains fully valid even

during times of crisis. As noted in *Rasul*, this Court has a very long tradition of entertaining the writ in a wide variety of Executive detention cases "in wartime as well as in times of peace." *Rasul*, 542 U.S. at 474.

> "The Court has, for example, entertained the habeas petitions of an American citizen who plotted an attack on military installations during the Civil War, *Ex parte Milligan*, 4 Wall. 2 (1866), and of admitted enemy aliens convicted of war crimes during a declared war and held in the United States, *Ex parte Quirin*, 317 U.S. 1 (1942), and its insular possessions, *In re Yamashita*, 327 U.S. 1 (1946)." 542 U.S. at 474-75.

This Court's clear adherence to the continued operation of the writ of habeas corpus even in the context of the Civil War and World War II vindicates the role of federal courts as the ultimate judges of the lawfulness of Executive detention.

Even during our last declared war, World War II, when the Nation was truly at peril and the entire country was on a war footing, this Court asserted the power and responsibility to review the lawfulness of military detentions that the Executive Branch considered necessary. See *Korematsu* v. *United States*, 323 U.S. 214 (1944). The Court ultimately upheld an Executive Order providing for military confinement of persons of Japanese ancestry—over dissents by Justice Jackson and others that history has regarded as more faithful to the Constitution. But it was *the Court* that decided whether the detentions were legally permissible.

In *Ex parte Endo*, 323 U.S. 283 (1944), decided the same day as *Korematsu*, the Court granted a writ of habeas corpus in a case arising from the same World War II military policy of exclusion and detention. The Court reviewed the basis proffered for the Executive detention and found it insufficient, because the petitioner was not a spy or saboteur: "When the power to detain is derived from the power to

protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized." *Id.* at 302.

Once again this Court is called upon to protect the constitutional balance and to assert the continuing vitality of the privilege of the writ of habeas corpus, even in the face of the expedient preference of the political branches to ignore this historic guarantee of human liberty.

II. Federal Courts Have Jurisdiction To Adjudicate Petitions For Writs Of Habeas Corpus By Guantanamo Detainees.

Not only should certiorari be granted, but to protect the function of the writ as assuring "prompt" review, the case should be expedited. The Constitution, codifying the common law function of the writ, requires no less.

A. This Court has already decided that the common law writ of habeas corpus covers the Guantanamo Detainees.

Article I, § 9, cl. 2 of the Constitution declares: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." By articulating the narrow circumstances under which Congress may *suspend* the privilege of the writ of habeas corpus, the Suspension Clause functions as a constitutional codification of the *availability* of the writ—unless validly suspended.

The writ mentioned in the Suspension Clause "is that great and celebrated writ, used in all cases of illegal confinement, known by the name of the writ of *habeas corpus ad subjiciendum*, directed to the person detaining another, and commanding him to produce the body of the prisoner, * * * to do, submit to, and receive, whatsoever the judge or court, awarding such writ, shall consider in that behalf." JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 206 (1833).

This Court has stated that "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" *St. Cyr*, 533 U.S. at 301 (quoting *Felker* v. *Turpin*, 518 U.S. 651, 663-64 (1996)). The writ requires the Executive to come into court to justify the legality of the detention of the person whom the Executive has imprisoned and who invokes the privilege of the writ, making the court the ultimate judge of the lawfulness of the detention.

There is no need to answer the question anew whether the common law scope of the writ of habeas corpus reaches the Guantanamo Detainees. This Court has already resolved the inquiry:

> "Application of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus. At common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm, as well as the claims of persons detained in the so-called 'exempt jurisdictions,' where ordinary writs did not run, and all other dominions under the sovereign's control. As Lord Mansfield wrote in 1759, even if a territory was 'no part of the realm,' there was 'no doubt' as to the court's power to issue writs of habeas corpus if the territory was 'under the subjection of the Crown.' *King* v. *Cowle*, 2 Burr. 834, 854-855, 97 Eng. Rep. 587, 598-599 (K.B.). Later cases confirmed that the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of 'the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown.' *Ex parte Mwenya*, [1960] 1 Q.B. 241, 303 (C.A.) (Lord Evershed, M. R.)." *Rasul*, 542 U.S. at 481-82 (internal footnotes omitted).

This Court, therefore, already has concluded that extending the writ of habeas to the Guantanamo Detainees is

consistent with the common law reach of the writ. The historical basis for this conclusion is amply laid out in the footnotes in the passage quoted above, *id.* at 481-82 nn. 11-14, and in the relevant passage of Judge Rogers's dissent below, *Boumediene* v. *Bush*, __ F.3d __, 2007 WL 506581, at *14 to *16 (D.C. Cir. Feb. 20, 2007) (Rogers, J., dissenting).

By engaging in an analysis of the common law meaning of the writ of habeas corpus in order to determine the application of the habeas statute, this Court in *Rasul* presupposed that the habeas statute was coextensive as a matter of scope (though not necessarily procedure) with the constitutional scope of the writ protected by the Suspension Clause. The Court explicitly grounded its interpretation of the Guantanamo Detainees' statutory right in "the historical reach of the writ of habeas corpus" at common law. *Rasul*, 542 U.S. at 481. *Rasul* also makes clear that it is the common law scope of the writ that the Constitution presupposes, codifies and protects.

Therefore, repeal of the habeas *statute* does not and cannot undermine the historic, constitutionally protected scope of the writ, which the Court held available to the Guantanamo Detainees. The privilege of the writ can be stripped from these men only in compliance with the Constitution's requirements, not at the whim of the Executive or Legislature.

B. The DTA and MCA do not validly bar access to the constitutionally guaranteed common law writ of habeas corpus.

Rasul establishes that the common law writ of habeas corpus as it existed in 1789—the bare minimum scope of the writ guaranteed by the Constitution—applies to the Guantanamo Detainees. In enacting the DTA and MCA and purporting to repeal the statutory basis for habeas jurisdiction over the claims of Guantanamo Detainees, Congress did not

provide an adequate alternative procedure for challenging their detention. Therefore, these statutes necessarily "suspend" the writ and are unconstitutional unless they satisfy the Suspension Clause.

By explicitly circumscribing any governmental intrusion on the reach of the writ as it was understood at common law, the Suspension Clause creates constitutional protection for habeas corpus. See JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 33 (1873) ("The privilege of this writ is also made an express constitutional right at all times, except in cases of invasion or rebellion, by the Constitution of the United States."). The Constitution presupposes that this structural right belongs to all persons who would have enjoyed the privilege at common law. By its express terms as part of Article I, § 9, the Clause functions as a limitation on Congressional power, prescribing the limited conditions under which Congress can contract the scope of the writ.[4]

The parties below briefed, and Judge Rogers addressed extensively, the infirmity of the DTA and MCA when they are viewed, as they must, as operating to suspend the constitutionally assured privilege of the writ. Judge Rogers demonstrated that the alternative procedures followed by the combatant status review tribunals (CSRTs) do not provide a constitutionally adequate alternative procedure to a writ of habeas corpus for challenging Executive detention. These so-called "tribunals" are not the kind of court that the writ assumes—a court independent of the Executive, as the common law courts were independent of the King. These "tribunals" are part of the military establishment in the Executive Branch, and it is the very purpose of the writ to subject Executive detention to *independent* judicial review.

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[4] Dissenting below, Judge Rogers demonstrated how the Suspension Clause functions as a limitation on congressional power. See *Boumediene*, 2007 WL 506581, at *10 to *12 (Rogers, J., dissenting).

The CSRTs' other infirmities include, *inter alia*, that the detainee (1) "bears the burden of coming forward with evidence explaining why he should not be detained," (2) "need not be informed of the basis for his detention," (3) "need not be allowed to introduce rebuttal evidence," (4) "must proceed without the benefit of his own counsel," and (5) can have his detention justified by "evidence resulting from torture." *Boumediene*, 2007 WL 506581, at *18 to *19 (Rogers, J., dissenting).

The DTA and MCA also do not comply with the Suspension Clause because, unlike previous, valid suspensions of the writ, the statutes make no reference to "rebellion" or "invasion," were not passed during a period of rebellion or invasion, and are not limited to the duration of any "necessity." Furthermore, it is dispositive that "there is no indication that Congress even sought to avail itself of the exception in the Suspension Clause." *Id.* at *20.

Under the opinion of the court below, there can be no federal court review whatsoever of the basis for indefinite, uncharged detention of the Guantanamo Detainees beyond the narrow review provided by the DTA. Limited review in the D.C. Circuit of an adverse determination by a CSRT does not adequately replace the searching inquiry guaranteed by habeas corpus, when a person is being detained without charge and before any conviction by *any* process. The DTA allows judicial review of the record of the CSRT only to "assess whether the CSRT has complied with its own standards." *Boumediene*, 2007 WL 506581, at *19 (Rogers, J., dissenting); DTA § 1005(e)(2), 119 Stat. at 2742. Under this new regime, the Guantanamo Detainees cannot obtain what habeas assures, an independent judicial determination whether lawful grounds exist to continue to imprison them.

C. The court of appeals majority opinion is inconsistent with *Rasul* and not mandated by *Eisentrager*.

Amici have discussed above how a straightforward application of *Rasul* is inconsistent with the court of appeals decision in this case. The majority below contended that "[e]ven if *Rasul* somehow calls *Eisentrager*'s constitutional holding into question, as detainees suppose, we would be bound to follow *Eisentrager*." *Boumediene*, 2007 WL 506581, at *7 n.10. That seeming deference to *Eisentrager* erects a false conflict that the Court in *Rasul* disclaimed.

First, *Johnson* v. *Eisentrager*, 399 U.S. 763 (1950), did not address the constitutional right to a writ of habeas corpus by petitioners in the position of the Guantanamo Detainees, who, unlike the petitioners in *Eisentrager*, are located in a place where the United States has the right to "exercise complete jurisdiction and control." *Rasul*, 542 U.S. at 471 (quoting 1903 Lease for Guantanamo base). In this context, the majority below was simply wrong in asserting that "[a]ny distinction between the naval base at Guantanamo Bay and the prison in Landsberg, Germany, where the petitioners in *Eisentrager* were held, is immaterial to the application of the Suspension Clause." *Boumediene*, 2007 WL 506581, at *7. In *Rasul* this Court expressly concluded that the Guantanamo Detainees "differ from the *Eisentrager* detainees" in part because "they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control." 542 U.S. at 476. Justice Kennedy's concurrence laid out in detail how "Guantanamo Bay is in every practical respect a United States territory." *Id.* at 487 (Kennedy, J., concurring in the judgment).

Second, the court below never came to terms with the numerous other relevant ways the *Rasul* Court determined that the Guantanamo Bay detainees were "differently situated from the *Eisentrager* detainees." *Rasul*, 542 U.S. at 476. The court of appeals ignored Justice Kennedy's detailed analysis of how "follow[ing] the framework of *Eisentrager*"

leads to the conclusion that the detainees are entitled to the privilege of the writ of habeas corpus. *Rasul*, 542 U.S. at 485-88. Neither this Court nor Justice Kennedy in his concurrence ever suggested that amending the habeas statute could, consistent with the Constitution, properly suspend the Guantanamo Detainees' right to petition for a writ of habeas corpus.

Furthermore, there is no historical support for the position that the common law writ of habeas corpus as it existed in 1789 would *not* have extended to persons in the position of the Guantanamo Detainees. As Judge Rogers pointed out, the panel majority could "point to no case where an English court has refused to exercise habeas jurisdiction because the alleged enemy being held, while under the control of the Crown, was not within the Crown's dominions. * * * The question is whether by the process of inference from similar, if not identical, situations the reach of the writ at common law would have extended to the detainees' petitions." *Boumediene*, 2007 WL 506581, at *14.

In *Rasul* the Court expressly ruled that habeas jurisdiction over the claims of Guantanamo Detainees "is consistent with the historical reach of the writ of habeas corpus." 542 U.S. at 481. Respect for this Court's analysis should have led the court below to follow the Court's precedent and, indeed, its mandate in these related cases.

D. The writ of habeas corpus carries the promise of prompt, substantive review, which the decision below frustrates.

Blackstone, writing almost a quarter of a millennium ago, described the writ of habeas corpus as the most basic test of the validity of imprisonment:

> "To assert an absolute exemption from imprisonment in all cases, is inconsistent with every idea of law and political society; and in the end would destroy all civil liberty, by rendering it's

> protection impossible: but the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree, the imprisonment of the subject may be lawful. This induces an absolute necessity of expressing upon every commitment the reason for which it is made; that the court upon an *habeas corpus* may examine it's validity; and according to the circumstances of the case may discharge, admit to bail, or remand the prisoner." WILLIAM BLACKSTONE, 3 COMMENTARIES ON THE LAWS OF ENGLAND 133 (1st ed. 1765-69).

Blackstone's description of the functioning of the writ at common law not only expresses the conception of the writ as the law's most basic protection against the tyranny of an unjustified detention. He also describes the force the writ had at common law to compel the Executive, in seeking to justify detentions, to account to the independent law courts. As Judge Rogers put it in her dissent in this case: "Throughout history, courts reviewing the Executive detention of prisoners have engaged in searching factual review of the Executive's claims." *Boumediene*, 2007 WL 506581, at *22. This is what Blackstone meant when he described the "absolute necessity of expressing upon every commitment the reason for which it is made," so that a court "may examine its validity" upon a writ of habeas corpus.

Justice Joseph Story also spoke of the writ's substantive assurance of basic review of the sufficiency of the claimed grounds for detention. In his COMMENTARIES, he declared that the writ of habeas corpus is

> "justly esteemed the great bulwark of personal liberty; since it is the appropriate remedy to ascertain, whether any person is rightfully in confinement or not, and the cause of his confinement; and *if no sufficient ground of detention appears, the party is entitled to his immediate*

> *discharge*. This writ is most beneficially construed; and is applied in every case of illegal restraint, whatever it may be; for *every restraint upon a man's liberty is, in the eye of the law, an imprisonment, wherever may be the place, or whatever the manner, in which the restraint is effected*." JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 206 (1833) (emphasis added).

The Suspension Clause, by impliedly codifying the availability of the common law writ, also codified the common law remedy. And that remedy is, at the very least, thorough scrutiny of the Executive's claimed, factual grounds for detention, accompanied by the right to be set free if the court finds no legitimate grounds for detaining the person. Without guaranteeing such a remedy, the writ carries none of its common law force and is effectively suspended in violation of the Suspension Clause.

The precise scope of habeas review may depend upon the nature of the procedures that led to the detention under review, but habeas review always scrutinizes the factual basis underlying the Executive's assertion that the detainee is subject to military detention in the first place. The Court has been willing to limit its review of military detentions after *conviction* of a crime by a military tribunal, so long as that military tribunal has valid jurisdiction over the person. That is, *the reviewing court* first must be satisfied that the person's status made him *subject to military detention*.

In each of the three pivotal cases cited by the Court in *Rasul* as examples of habeas review in wartime—*Milligan*, *Quirin*, and *Yamashita*—the petitioners had been tried and convicted by a military tribunal.[5] In each of those cases, the

[5] The convictions that were being reviewed were the result of a formal trial process very different from the essentially *ex parte* process the CSRTs provide to the Guantanamo Detainees. See

Court determined that the threshold question in testing the validity of military detention was whether, in fact, the person's individual status made him subject to military authority at all. See *Milligan*, 71 U.S. at 108 (explaining that Milligan insisted, correctly, that as a non-combatant civilian "said military commission had no jurisdiction to try him"); *Quirin*, 317 U.S. at 19 (describing as "stipulated" and "undisputed" the petitioners' status as German soldiers conducting illegal wartime activities); *Yamashita*, 327 U.S. at 5 (accepting petitioner's role as Commanding General of the Imperial Japanese Army in the Philippine Islands as established by "the petitions and supporting papers"). See also *Reid* v. *Covert*, 354 U.S. 1 (1957) (Constitution ordinarily precludes military tribunals from asserting jurisdiction to detain and try civilians).

In this case, the Guantanamo Detainees present the threshold question whether there is a factual basis for their detentions. The validity of any detention turns on underlying facts about the individual Detainee's status as an actual combatant in a quasi-military campaign against the United States. Those facts are sharply disputed. There is substantial reason to believe that the CSRT process is not a reliable way to resolve those factual disputes fairly. In any event, it is the office of the Great Writ to subject the operative facts on which detention turns to searching inquiry by an independent court.

To test whether there is valid cause for confinement, a court entertaining a petition for a writ of habeas corpus must look beyond the CSRT process to inquire into the factual basis itself. See *Boumediene*, 2007 WL 506581, at *23 (Rogers, J., dissenting) ("There is good reason to treat

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Boumediene, 2007 WL 506581, at *23 (Rogers, J., dissenting) ("The robustness of the review [the Guantanamo Detainees] have received to date differs by orders of magnitude from that of the military tribunal cases.").

differently a petition by an uncharged detainee—who could be held indefinitely without even the prospect of a trial or meaningful process—from that of a convicted war criminal.").

The type of review assured by the writ of habeas corpus can be found in *Ex parte Bollman*, 8 U.S. 75 (1807), an early habeas opinion authored by Chief Justice Marshall. In *Bollman*, this Court reviewed the detention of two persons accused of levying war against the United States but not yet charged. The situation was analogous to that of the Guantanamo Detainees. The Court proceeded "to do that which the court below ought to have done." *Id.* at 114. In proceedings stretching over five days and with the prisoners present in court, it "fully examined and attentively considered" on an item-by-item basis "the testimony on which they were committed," held it insufficient and ordered their discharge. *Id.* at 125, 128-36. See *Boumediene*, 2007 WL 506581, at *22 to *23 (Rogers, J., dissenting) for a discussion of other cases reviewing Executive detentions and conducting "searching factual review of the Executive's claims" pursuant to an application for a writ of habeas corpus, even in wartime.

Justice Kennedy, in his *Rasul* concurrence, crisply explained how indefinite detention without trial implicates the privilege of a writ of habeas corpus in a more compelling way than detention resulting from conviction by a court or even a properly constituted military tribunal:

> "Indefinite detention without trial or other proceeding presents altogether different considerations [than being tried and convicted by a military commission]. It allows friends and foes alike to remain in detention. It suggests a weaker case of military necessity and much greater alignment with the traditional function of habeas corpus." *Rasul*, 542 U.S. at 488 (Kennedy, J., concurring in the judgment).

Despite this Court's explicit holding in *Rasul* that the common law reach of habeas corpus extends to the Guantanamo Detainees, and its explicit statement in *St. Cyr* that the common law reach is the "absolute minimum" scope of the writ, the court of appeals has nevertheless disallowed what Justice Story described as "the appropriate remedy to ascertain, whether any person is rightfully in confinement or not, and the cause of his confinement." As Justice Kennedy explained in his *Rasul* concurrence, "[T]here are circumstances in which the courts maintain the power and the responsibility to protect persons from unlawful detention even where military affairs are implicated." 542 U.S. at 487 (Kennedy, J., concurring in the judgment).

The Guantanamo Detainees have been seeking this judicial scrutiny for five years. At every turn, the Executive (now with congressional cooperation) has sought to frustrate their resort to the Great Writ. By tolerating this evasion, the court of appeals abandoned the historic duty of the judiciary as enshrined in the Constitution. Only prompt action by this Court can restore the integrity of the Great Writ and protect its own mandate in *Rasul*.

The Guantanamo Detainees do not ask for anything more than this Court acknowledged was their due almost three long years ago. All they ask is to be able to have an independent court inquire whether they are rightfully detained. After more than five years in harsh military confinement, with no end in sight and no knowledge whether an end even exists, it is time for the courts to begin that inquiry and determine the merits of their claims.

CONCLUSION

The petition for a writ of certiorari should be granted and the case set for expedited briefing and argument.

Respectfully submitted.

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APPENDIX

APPENDIX
AMICI INFORMATION

The *amici* are as follows:

Diego C. Asencio served as Ambassador to Colombia from 1977 to 1980, Assistant Secretary of State for Consular Affairs from 1980 to 1983, Ambassador to Brazil from 1983 to 1986, and Chairman of the Commission for the Study of International Migration and Cooperative Economic Development from 1987 to 1989.

Brigadier General David M. Brahms served in the Marine Corps from 1963 through 1988, with a tour of duty in Vietnam, and was the senior legal advisor for the Marine Corps from 1985 through 1988, when he retired from the military. General Brahms is currently in private practice in Carlsbad, California and is a member of the Board of Directors of the Judge Advocates Association.

A. Peter Burleigh served as Ambassador and Coordinator for Counter-Terrorism from 1991 to 1992, Ambassador to Sri Lanka and the Maldives from 1995 to 1997, and Ambassador and Deputy Permanent Representative to the United Nations from 1997 to 1999.

Rear Admiral Donald J. Guter was a line officer in the United States Navy from 1970 through 1974. After a break for law school, he returned to the Navy in 1977 and remained in the Navy until 2002, when he retired from the military. He served as the Navy's Judge Advocate General from June 2000 through June 2002. Rear Admiral Guter was in the Pentagon when it was attacked by terrorists on September 11, 2001. He is currently the Dean of Duquesne Law School in Pittsburgh, Pennsylvania.

Conrad K. Harper served as Legal Adviser of the United States Department of State from 1993 to 1996. He is a lawyer in private practice in New York City with Simpson Thacher & Bartlett LLP and has been a member of the Permanent Court of Arbitration at The Hague. He has

previously been a member of and held leadership positions in a range of other bar, human rights and international organizations. His law firm is counsel to two Saudi detainees in *Alsaaei* v. *Bush*, No. 05-2369 (D.D.C.) and *Al Darby* v. *Bush*, No. 05-2371 (D.D.C.).

Allen Holmes served as Ambassador to Portugal from 1982 to 1985, Assistant Secretary of State for Political-Military Affairs from 1985 to 1989, and Assistant Secretary of Defense for Special Operations and Low Intensity Conflict from 1993 to 1999.

Rear Admiral John D. Hutson served in the United States Navy from 1973 to 2000. He was the Navy's Judge Advocate General from 1997 to 2000. He is presently the Dean and President of the Franklin Pierce Law Center in Concord, New Hampshire.

Leslie H. Jackson is a former American prisoner of war detained by the German government during World War II. Mr. Jackson is the Executive Director of American Ex-Prisoners of War, a non-profit, congressionally chartered veterans organization that represents approximately 50,000 former prisoners of war and their families.

Hon. Nathaniel R. Jones served as a judge on the United States Court of Appeals for the Sixth Circuit from 1979 to 2002. Prior to taking the bench, he served as General Counsel for the National Association for the Advancement of Colored People from 1969 to 1972, and as Co-Chair, U.S. Department of Defense Civil-Military Task Force on Military Justice in 1972.

Karen Korematsu-Haigh is the daughter of Fred Korematsu, the petitioner in *Korematsu* v. *United States*, 323 U.S. 214 (1944), who died in 2005. Ms. Korematsu-Haigh continues to work to preserve her father's legacy, and is Co-founder of The Fred Korematsu Civil Rights Education Center, established in 1989 in association with the Asian Law Caucus, San Francisco.

Samuel W. Lewis served as Assistant Secretary of State for International Organization Affairs from 1975 to 1977, Ambassador to Israel from 1977 to 1985, and Director of the State Department Policy Planning Staff from 1993 to 1994.

Hon. Abner J. Mikva served as a judge on the United States Court of Appeals for the District of Columbia Circuit from 1979 to 1994, and as Chief Judge from 1991 to 1994. He also served as White House Counsel from 1994 to 1995. Prior to taking the bench, he served five terms as a member of Congress, representing portions of Chicago and its suburbs.

Arthur Mudge served as USAID Assistant General Counsel from 1967 to 1969, USAID Mission Director in Guyana from 1974 to 1976, USAID Mission Director in Nicaragua from 1976 to 1978, and USAID Mission Director in Sudan from 1980 to 1983.

Richard H. Nolte served as Ambassador to Egypt in 1967.

Hon. William A. Norris served as a judge on the United States Court of Appeals for the Ninth Circuit from 1980 to 1997.

Herbert S. Okun served as Ambassador to the German Democratic Republic from 1980 to 1983, Ambassador and Deputy Permanent Representative to the United Nations from 1985 to 1989, and United States Member of the Group of International Advisors to the International Committee of the Red Cross from 1996 to 2000. He was Visiting Lecturer in International Law at Yale Law School from 1991 to 2002.

Thomas R. Pickering served as Ambassador to Jordan (1974 to 1978), Assistant Secretary of State for Oceans, Environment and Science (1978 to 1981), Ambassador to Nigeria (1981 to 1983), Ambassador to El Salvador (1983 to 1985), Ambassador to Israel (1985 to 1988), Ambassador and Representative to the United Nations (1989 to 1992), Ambassador to India (1992 to 1993), Ambassador to the

Russian Federation (1993 to 1996), and Under Secretary of State for Political Affairs (1997 to 2001).

Anthony Quainton served as Ambassador to Central African Republic from 1976 to 1978, Ambassador to Nicaragua from 1982 to 1984, Ambassador to Kuwait from 1984 to 1987, Ambassador to Peru from 1989 to 1992, and Assistant Secretary of State for Diplomatic Security from 1992 to 1995.

Deborah L. Rhode is the Ernest W. McFarland Professor of Law at the Stanford University School of Law and served as Senior Counsel to Minority Members of the Judiciary Committee of the U.S. House of Representatives in 1998.

William D. Rogers served as Assistant Secretary of State for Inter-American Affairs, U.S. Coordinator, Alliance for Progress, from 1974 to 1976, and Under Secretary of State for Economic Affairs from 1976 to 1977.

Hon. H. Lee Sarokin served as a judge on the United States District Court for the District of New Jersey from 1979 to 1994, and on the United States Court of Appeals for the Third Circuit from 1994 to 1996.

Jerome J. Shestack served as president of the American Bar Association and in numerous other leadership positions of the ABA, including chair of the Section on Individual Rights and Responsibilities. He is a lawyer in private practice in Philadelphia.

Monteagle Stearns served as Ambassador to Ivory Coast from 1976 to 1979, Vice President of the National Defense University from 1979 to 1981, and Ambassador to Greece from 1981 to 1985.

Richard N. Viets served as Ambassador to Jordan from 1981 to 1984.

Alexander F. Watson served as Ambassador to Peru from 1986 to 1989, Ambassador and Deputy Permanent Representative to the United Nations from 1989 to 1993, and

Assistant Secretary of State for Western Hemisphere Affairs from 1993 to 1996.